No 289.

IN THE

United States Circuit Court

OF APPEALS

FOR THE

NINTH CIRCUIT.

WILLIS THORP,

Plaintiff in Error,

vs.

S. A. BONNIFIED AND JOHN G. HEID,

Defendants in Error.

FILED
OCT 10 189

Writ of Error from the District Court of Alaska.

BRIEF OF PLAINTIFF IN ERROR.

BOSTWICK & CREWS,

Attorneys for Plaintiff in Error.

HARRISON BOSTWICK,

Advocate.

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MOTION TO STRIKE.

Plaintiff in error now renews his motion to strike from the record, the affidavits of John G. Heid, C. S. Johnson and John F. Malony.

See Record, pages 113 to 129 inclusive.

Said motion to strike is based upon the same grounds embodied in the order denying motion to strike made by the District Court of Alaska, on February 29, 1896.

See Record, page 130.

STATEMENT OF THE CASE.

The defendants in error commenced an action in the United States District Court, for the District of Alaska, against the plaintiff in error, which resulted in judgment by default against the plaintiff in error on the 25th day of January, 1896, for seven thousand two hundred thirty-one and 25-100 dollars ($7,231.25) damages and costs thirty-three and 55-100 dollars ($33.55); and the plaintiff in error sued out a writ of error, in the cause to this court.

The claim of the defendants in error, against the plaintiff in error, was based upon a lease and contract made and executed by and between William M. Bennett acting for himself and as the administrator of the estate of Michael H. Gibbons, deceased, and Al. Runkle and S. A. Bonnifield and the several assignments made of said lease and contract.

See Record, pages 5 to 14 inclusive.
Exhibits A, B, C and D, of complaint.

William M. Bennett and the estate of Michael H. Gibbons, deceased, were the owners of that certain mining claim known as the Aurora Lode Mining Claim, United States mineral survey. lot number forty-one (41), on the 25th day of April, A. D. 1894.

On that day a lease and contract of sale was entered into between William M. Bennett, acting for himself and as the administrator of the estate of Michael H. Gibbons, deceased,

as parties of the first part, and Al. Runkle and S. A. Bonnifield, parties of the second part.

See Record, pages 5 to 9.
Exhibit A to complaint.

In said contract and lease it was, among other things, provided, conditioned and agreed that the said parties of the second part should pay to the parties of the first part the following sums, to-wit: One hundred dollars ($100.00) on execution of contract and lease, five hundred dollars ($500.00) on or before June 1, 1894; and

Nine hundred dollars $900.00) in thirty (30) days thereafter; and

Twenty-three hundred dollars ($2300.00) on or before August 15, 1894; and

Five hundred dollars ($500.00) in October, 1894; making a total sum of forty-three hundred dollars ($4300.00).

It was provided and conditioned in said lease and contract that, upon the payment of the said several sums by the said Al. Runkle and S. A. Bonnifield to the parties of the first part in said lease and contract mentioned, the said Al. Runkle and S. A. Bonnifield should have the right to work and mine said Aurora Lode Claim in such manner as they saw fit, for a period of two (2) years from the date of said contract, to-wit, April 24, 1894;

That said lease and contract further provided that, upon the payment by said Runkle and Bonnifield to the parties of the first part, William M. Bennett and the estate of Michael H. Gibbons, deceased, of the further sum of thirty-five thousand seven hundred dollars ($35,700.00), at any time within two (2) years from April 25, 1894, the said William M. Bennett acting for himself, and as administrator of the estate of Michael H. Gibbons, deceased, should convey the said premises, in said lease and contract mentioned, to Al Runkle and S. A. Bonnifield.

That in said lease and contract it was expressly provided that the same should not be sublet, nor any other person or persons permitted to occupy, possess or work the mine in said lease and contract described, without the written consent of the said William M. Bennett, acting for himself and as the administrator of the estate of Michael H. Gibbons, deceased, first being obtained.

On May 7, 1894, Al. Runkle and S. A. Bonnifield in consideration of the sum of one dollar ($1.00) assigned an undivided one-eighth (1-8) interest or part of, in and to said lease and contract, made and entered into on April 25, 1894, between Al. Runkle and S. A. Bonnifield and William M. Bennett acting for himself and as the administrator of the estate of Michael H. Gibbons, deceased, to one John G. Heid.

That in said assignment it was expressly provided that said Heid should not be entitled to any dividend or share of, in and to the output of the said Aurora Lode Claim, to be worked, mined and operated by the said Runkle and Bonnifield, until the first four (4) payments in said agreement mentioned, together with the costs and expenses of operating and working said Aurora Lode Claim had been fully paid, at the dates when the said four (4) payments mentioned in said agreement were to be paid by the said Runkle and Bonnifield.

See Record, pages 10 and 11.
Exhibit B to complaint.

That the consent of the estate of Michael H. Gibbons, deceased, was never given by William M. Bennett, administrator thereof, to said assignment.

See Record, page 11.

All of the right, title and interest of Al. Runkle of, in and to said lease and contract up to January 1, 1895, was sold and transferred to S. A. Bonnifield.

See Record, pages 11 and 12.
Exhibit C to complaint.

On the 25th day of June, 1894, S. A. Bonnifield and John G. Heid transferred all of their interest, right, title and claim of, in and to said lease and contract, for the term up to and including December 31, 1894, to the plaintiff in error, Willis Thorp.

See Record, pages 12 to 14 inclusive.
Exhibit D to complaint.

That one of the considerations for the transfer of said lease and contract by S. A. Bonnifield and John G. Heid to Willis Thorp, was the agreement on the part of the said Willis Thorp to pay a certain claim then due Robert Duncan, Jr., and J. Parker Corbus; that said claim grew out of a mortgage made and executed by William M. Bennett acting for himself and as administrator of the estate of Michael H. Gibbons, deceased, to the said Robert Duncan, Jr., and J. Parker Corbus, covering the Aurora Lode Mining Claim, as described in said lease and contract; that at the time of the said transfer by S. A. Bonnifield and John G. Heid to Willis Thorp a suit was pending for the foreclosure of said mortgage, and a restraining order had been issued out of the United States District Court, for the District of Alaska, in favor of Robert Duncan, Jr., and J. Parker Corbus, plaintiffs, and against William M. Bennett acting for himself and as administrator of the estate of Michael H. Gibbons, deceased, and Al. Runkle and S. A. Bonnifield, defendants, restraining and enjoining said defendants from mining, taking out or removing ore of or from the Aurora Lode Claim.

See Record, pages 12 to 14.
Exhibit D to complaint.

As a further consideration for the transfer of said lease and contract by S. A. Bonnifield and John G. Heid to Willis Thorp it was provided in said assignment that, after the pay-

ment of the moneys due said Robert Duncan, Jr., and J. Parker Corbus that the said Willis Thorp should have seven-sixteenths (7-16) of the net proceeds arising from the conduct and operation of said Aurora Lode Mining Claim, after paying all expenses of working and mining the same; and the nine-sixteenths (9-16) part of the net proceeds and profits derived by the said Willis Thorp during the said term should be paid to S. A. Bonnifield and John G. Heid.

See Record, pages 12 to 14.
Exhibit D to complaint.

These are the facts out of which this controversy arose; and this suit was commenced by the filing and service of complaint, which is in words and figures following, to-wit:

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF ALASKA.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, vs. WILLIS THORP, Defendent.	COMPLAINT. No. ......

For complaint in the above entitled action the plaintiff complains and alleges

That on the 25th day of April, 1895, William M. Bennett, for himself and as the administrator of the estate of Michael Gibbons, deceased, leased and let, for the term of two years, to one Al. Runkle, those certain mining premises, situate in Silver Bow Basin, Harris Mining District, Alaska, known as the Aurora Lode Claim, United States survey, lot No. 41;

and in consideration thereof the said Runkle agreed to pay the said Bennett the sum of $500 on or before June 1, 1894, unless the weather prevented the operating of the quartz mill, and in that event as soon as the ore from the mine could be taken to the mill; $900 payable 30 days after the payment of said $500; $2300 on or before August 15, 1894, and $500 in the month of October, 1894, said sums to be used in payment of a certain mortgage on said premises held by Robert Duncan, Jr., and J. Parker Corbus.

That afterwards, to-wit, on the 5th day of May, 1894, by mutual agreement between said Bennett and Runkle, S. A. Bonnifield, one of the plaintiffs herein, became a party to said lease and by consent of said Bennett and Runkle his name was inserted in and added to said lease and he then and there became one of the lessors of said premises, a copy of which lease, with the agreement for said Bonnifield to become one of the lessors, is hereto annexed, marked "Exhibit A," and made a part of this complaint.

That on the 7th day of May, 1894, the said Al. Runkle and S. A. Bonnifield sold, transferred and assigned, for a good and valuable consideration, an undivided one-eighth (1-8) interest in and to the lease of said Aurora Lode Claim, with the consent of said Bennett, to John G. Heid, one of the plaintiffs herein, a copy of which assignment, with the consent thereto, is hereto attached and made a part of this complaint and marked "Exhibit B."

That on or about the 1st day of June, 1894, the said Al. Runkle sold, transferred and assigned unto S. A. Bonnifield, one of the plaintiffs herein, his interest in the lease of said premises and all his right, title and interest thereto up to and until the 31st day of December, 1894, for a good and valuable consideration and subject to the conditions in said lease, a copy of which assignment is hereto annexed, marked "Exhibit C" and made a part of this complaint.

That afterwards, to-wit, on the 26th day of June, 1894,

the said S. A. Bonnifield and John G. Heid, with the consent of said William M. Bennett, entered into an agreement and did agree with Willis Thorp, the defendant herein, by which it was agreed by and between said parties that in consideration of said Bonnifield and Heid assigning all their right, title and interest in and to the lease of said premises and the possession thereof, up to and until the 31st day of December, 1894, to said defendant Thorp, subject to the rents, payments, conditions and covenants contained in the original lease from said Bennett to said Runkle and Bonnifield and the payment of the mortgage on said premises held by Robert Duncan, Jr., and J. Parker Corbus, which the payments set forth in the original lease were intended to cancel, a copy of which assignment is hereto attached, marked "Exhibit D" and made a part of this complaint, the said Thorp did agree with said Bonnifield and Heid to pay said mortgage, to-wit, the sum of $3,686.59, and to assume and pay all and every claim standing against or on account of said premises contracted by said Bonnifield and Runkle, at the date thereof.

That the said defendant, Thorp, further agreed to mine, work and operate said premises and after making all the payments in said lease mentioned, to-wit, the amount of said mortgage and debts contracted on account of said premises, was to retain for himself seven-sixteenths (7-16) parts of the profits or net proceeds arising from the operation of said mine and premises, and to pay to these plaintiffs, S. A. Bonnifield and John G. Heid, the remaining nine-sixteenths (9-16) parts of the profits or net proceeds arising from said operation of said mine and premises in the proportion of seven-sixteenths to Bonnifield and two-sixteenths to Heid.

That under and in accordance with said agreement and assignment of said lease the said Willis Thorp entered into the possession of said premises and worked, mined and operated the same up to and until the 31st day of December, 1894, extracting and taking out therefrom gold to the value and

amount of $32,000.00, and ore and concentrates to the amount and value of $3,500.00, of which he disposed and sold the same.

That the cost and expense of working, mining, operating and extracting said gold and ore from said premises was $23,000.00, leaving a balance of profits or net proceeds of $12,500.00, of which the said Bonnifield and Heid were entitled to nine-sixteenths thereof.

That under said assignment and as a part of the expenses incurred in connection with said premises was the sum of $200 advanced and paid by the said Bonnifield and not repaid him from the earnings of said mine.

That the said defendant, Thorp, has failed and refused to pay said sums, or any part thereof, although often demanded.

Wherefore, plaintiffs demand judgment against said defendant in the sum of $7,231.25 and costs of action.

JOHNSON & HEID.
and
J. F. MALONY,
Attorney for Plaintiffs.

United States, District of Alaska. } ss:

S. A. Bonnifield, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action, that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 10th day of April, 1895.

(L. S.) J. F. MALONY, Notary Public.

The pleadings and proceedings had and done in this cause, from the filing of the complaint to granting writ of error, will be found on pages 17 to 98 of the Record.

ASSIGNMENT OF ERRORS.

I.

The Court erred in over-ruling defendant's general demurrer to plaintiff's complaint, to which over-ruling to said demurrer the defendant then and there excepted, and his exceptions were duly allowed by the Court.

II.

The Court erred in granting the plaintiff's default for want of an answer in the above enetitled cause, for the reason that the plaintiffs never notified the defendant, or his counsel, by notice or otherwise, that they intended to apply for said default.

III.

The Court erred in refusing to set aside the default granted as aforesaid, upon the application and showing made by the defendant, Willis Thorp.

IV.

The Court erred in granting judgment on said default:

First—For the reason that no proof was offered in support of the allegations of plaintiff's complaint.

Second—That there was no application or motion for judgment on said default filed by the plaintiffs and that the defendant had no notice of the intention of the plaintiffs to apply for, or the Court granting said judgment, and there was no application, in writing, by motion, or otherwise, asking for judgment on said default.

V.

The Court erred in entering judgment in this cause in favor of the plaintiffs, which said judgment was entered on the 25th day of January, 1896.

VI.

The Court erred in refusing to allow defendant's motion to open up and set aside the said judgment on the showing made in support of said motion, as shown by the files, records and proceedings in said cause.

ARGUMENTS AND AUTHORITIES.

FIRST.

It fully appears from the record that the only party interested in this controversy, so far as this appeal is concerned, on the part of the defendants in error, is John G. Heid, the defendant in error S. A. Bonnifield having fully settled and satisfied his portion of said judgment, as appears by his affidavit on page 85 of the record, and in his said affidavit asks that said judgment be vacated and set aside and that the cause be reversed.

The complaint in this cause was attacked by general demurrer as to its sufficiency; also demurrer ore-tenus was argued directed against the said complaint on the ground that the same did not state a cause of action so far as the defendant in error John G. Heid was concerned.

The grounds for this demurrer is apparent from the reading of the complaint, which shows that after various assignments of the lease in controversy, S. A. Bonnifield became the sole owner of the same and John G. Heid received an one-eighth (1-8) interest in the lease by a pretended assignment from Al. Runkle and S. A. Bonnifield, which said assignment is set forth as Exhibit B and made a part of the complaint;

an examination of this assignment shows conclusively that John G. Heid had no interest in the lease, or in and to the property mentioned and described in said lease, at the time this complaint was filed, or at the time judgment was taken in this cause.

Attention is called to the last clause of Exhibit B, which will be found on page 11 of the record, and which is in words as follows:

"It is further understood that the said Heid shall not" "be entitled to any dividend or share of the output of said" "Aurora Lode Claim, to be worked and operated by the said" "S. A. Bonnifield, until the first four (4) payments in said" "agreement mentioned, together with the cost and expense" "of operating and working said Aurora Lode Claim have" "been fully paid."

There is not a single allegation in the complaint alleging that the said four (4) payments in said agreement have ever been made, or that the expense of operating and working said Aurora Lode Claim have been fully paid, or paid at all; on the contrary, it is apparent, from the complaint, and that is one of the matters in controversy, that the expense of operating and working said Aurora Lode Claim have never been paid, nor is there any specific allegation in said complaint as to what the amount of the claims were or are, consequently it is very apparent that while the complaint failed to state any cause of action at all by reason of its failure to show what the claims were, and the amount of the same, it certainly fails to show a cause of action in favor of the defendant in error, John G. Heid, for the reason that it fails to show that his claim in said lease, or mine, if any he had, had matured. consequently he will not be heard before this Court to claim anything by reason of the judgment, for the reason that there is no sufficient allegation in said complaint that would warrant the introduction of any proof in support of his claim.

SECOND.

On the 26th day of December, 1895, the defendants in error obtained order of default against the plaintiff in error, which order is in words and figures following, to-wit:

"The defendant having been duly served with summons" "and complaint, and having failed to answer the complaint," "and the time for answering the complaint having expired" "and no answer having been filed with the clerk of the court" "within the time allowed by law;"

"Now on motion of plaintiff's attorneys in open court" "the default of the defendant is hereby entered."

It must be apparent to this Court, from all of the records and proceedings had and done in this cause, that it was plainly the intention of plaintiff in error to defend this cause upon its merits; he appeared in due time, served and filed general notice of appearance, and motion to make complaint more definite and certain, and said motion was argued before the Court, and order thereupon made directing defendants in error to amend and correct their complaint.

See Record, pages 20 to 22.

The plaintiff in error served and filed general demurrer to plaintiff's complaint upon the ground that the same did not state facts sufficient to constitute a cause of action, and said demurrer was argued in due time, and was by the Court overruled, and in said order the plaintiff in error was given until December 23, 1895, in which to file his answer.

See pages 23 and 24 of the Record.

The time for answering, under said order, expired on December 23, 1895, and on December 24, 1895, defendant in error S. A. Bonnifield entered into a written stipulation with plaintiff in error extending the time to answer until March 1, 1896.

That said stipulation will be found on page 29 of the Record and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF ALASKA.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendent.

COMPLAINT.
No. 439.

STIPULATION EXTENDING TIME TO ANSWER.

It is hereby stipulated and agreed that defendant may have until March 1, 1896, in which to serve and file his answer in the foregoing cause.

Dated December 24, 1895.

S. A. BONNIFIELD.
Plaintiff.
BOSTWICK & CREWS,
Attorneys for Defendant.

The plaintiff in error relied absolutely upon the said stipulation, entered into with the said defendant in error S. A. Bonnifield; plaintiff in error, and his counsel, then believed and still believe that the said Bonnifield had a perfect right and legal authority to make and enter into the said stipulation in his own behalf; that plaintiff in error, relying upon the said stipulation, did not therefore file answer as he otherwise might have done on December 24, 1895.

Plaintiff in error did not file answer for the other and further reason, as appears from the affidavit of said Bonnifield herein, pages 85 to 90 of the Record, that negotiations

for a settlement were pending between the plaintiff in error and the defendant in error S. A. Bonnifield, and all parties to this action had due notice of that fact; that said proceedings for settlement were being negotiated between the plaintiff in error, Willis Thorp, and the defendant in error, S. A. Bonnifield, in person.

See also affidavit of Harrison Bostwick, pages 30 to 35 of the Record.

It is a fact, which cannot be disputed, and which is well known to this Court, as a matter of common knowledge, that there is but one way of reaching the seat of government in Alaska from Juneau, and that is by boat semi-monthly; it is also a fact that there is but one judge of the District of Alaska, and that said judge resides at the seat of government, Sitka, Alaska; the default in this case was taken on December 26, 1895, at Sitka, Alaska, without notice to plaintiff in error and the plaintiff in error had no means of reaching the Court, at Sitka, Alaska, until two (2) weeks after December 26, 1895, at which time the motion to set aside the default in this cause was by the plaintiff in error presented to the Court.

We are of the opinion that where a party has appeared generally in a cause that he is entitled to notice of all subsequent proceedings; this appears to be the general practice in nearly, if not in all, of the code states; it is the practice in New York, California and Washington; we believe that section 530, volume 1, Hill's Code of Oregon, means, if it means anything at all, that where a party has appeared generally in a cause he is entitled to notice of all subsequent proceedings in the action.

In this cause, as is disclosed by the Record, the defendants in error gave no notice to the plaintiff in error of their intention to move for default or for judgment herein; but on the contrary concealed that fact from the attorneys for plaintiff in error.

See affidavit, page 30 of the Record.

It was an error on the part of the trial Court to permit the default of the plaintiff in error to be entered or taken in this cause without notice to the plaintiff in error.

It is a fact that upon the bringing of this suit by the defendants in error a writ of attachment was issued, and all of the property of the plaintiff in error was attached; that immediately thereupon the plaintiff in error filed re-delivery bond, under the provision of the Code of Oregon, applicable to the District Court of Alaska, with good and sufficient sureties, approved by the United States marshal for the District of Alaska, to pay any judgment which the defendants in error might obtain against the plaintiff in error; that said bond was in full force and effect at the time the said default was granted, and would have so remained in full force and effect until the final determination of this cause upon its merits; and for that reason, if for no other, this default should not have been granted by the Court.

A general appearance of defendant, in person or by attorney, entitles him to notice, in writing, of all subsequent proceedings in the cause.

Section 822, Volume 1, Hill's Code of Washington.
Section 530, Volume 1, Hill's Code of Oregon.

THIRD.

The Court erred in refusing to vacate and set aside the default granted in this cause, on the 26th day of December, 1895, for the following reasons:

First—That said default was taken upon motion of counsel for defendant in error in open court, at Sitka, Alaska, and without giving notive to plaintiff in error, or his counsel, of their intention to move for said default.

Second—The plaintiff in error had a good, meritorious and just defense to said cause, upon the merits.

> See affidavit of Harrison Bostwick, pages 30 to 36 of the Record.

Third—The said default was taken through the mistake, inadvertance and excusable neglect or surprise of the plaintiff in error.

Fourth—The said default was taken upon motion of Messrs. Johnson and Heid, who at the time of taking said default had no authority to appear for the defendant in error, S. A. Bonnifield.

> See affidavit of S. A. Bonnifield, pages 85 to 90 of the Record.

Fifth—At the time said default was taken and entered, to-wit, December 26, 1895, the defendant in error S. A. Bonnifield had already signed stipulation with plaintiff in error, on to-wit, December 24, 1895, giving plaintiff in error until March 1, 1896, in which to serve and file his answer in this cause.

> See Record, page 29.

If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party, who upon hearing might have interposed a perfectly good defense.

If where a nisi prius court refuses to set aside a default, when a party shows with reasonable certainty that it has a good defense, and he has only been guilty of carelessness and inattention to his business, but no willful or fraudulent delay, it would be highly proper for the appellate court to come to his relief if the lower court refuses so to do.

> *Horton vs. New Pass Gold and Silver Mining Company et al., 26 Pacific Reporter, 376.*

In this case the plaintiff in error had a good and meritorious defense upon the merits as shown by affidavit used upon the motion to set aside said default; the plaintiff in error had given a good and sufficient bond, conditioned to pay any judgment which the defendants in error might recover against him in this cause, and as a result no possible injury or harm could have come to these defendants in error, as they were amply and fully protected and secured.

See affidavit of Harrison Bostwick, pages 30 to 36 of the Record.

Where the merits are shown by affidavits, upon motion to vacate default or judgment, counter affidavits on that question will not be heard.

Gracier vs. Wier, 45 California, 54.

While it is true that the opening up of defaults, or setting aside of judgments, by the trial court is largely in the discretion of the Court, the discretion spoken of, and what is meant, is only legal discretion; such action in the premises as will promote the ends of justice and protect the rights and interest of the parties.

13 Wisconsin, 485.
35 Wisconsin, 390.
70 Wisconsin, 212.
61 Wisconsin, 514.
18 California, 457.
68 California, 275.

Neglect of an attorney is neglect of the party, and excusable upon the ground for relief.

Austin vs. Nelson, 11 Missouri, 192.
Spaulding vs. Thompson, 12 Indiana 477.

The Supreme Court has power under section 102 of the Civil Code of Oregon (Hill's) to entertain an application to

relieve a party from the decree and judgment against it, through its mistake, inadvertance or excusable neglect or surprise.

Bronson vs. The Oregon Railway Co., 10 Oregon, 278.

The power to relieve from judgment under this section is discretionary, but the action of the Court will be reversed for abuse of discretion.

Bailey vs. Taaffe, 29 California, 422.
Johnson vs. Eldred, 13 Wisconsin, 482.
Powell vs. Weith, 68 North Carolina, 342.

The opinion of the Court upon the application to vacate default in this cause cannot be considered by this Court, for the reason that the affidavits and proofs submitted to the Court on final application, to set aside said judgment, were not before the Court at the time of rendering such opinion.

See page 15 of the Record.

The opinion of the Court under its own conclusions would necessarily have been different had the affidavits and proofs been considered by it, which were subsequently submitted upon the motion to vacate and set aside the default; and the authorities cited by the Court, in support of its opinion, supports our contention under our affidavits and proofs.

In denying the motion made by plaintiff in error, to have default vacated and set aside, the learned judge of the District Court of Alaska, Honorable Arthur K. Delaney, takes and assumes the responsibility of directing the entry of judgment in accordance with the summons and complaint, without any motion on the part of counsel for defendants in error.

See Record, pages 54 to 67.

And in making said order the Court writes a fifteen-page opinion, and in said opinion Judge Delaney attempts to vindicate his own action in a lengthy discussion of the law upon questions of default, and in a labored effort attempts to excuse his action by imposing the severest penalty upon the plaintiff in error within his power.

FOURTH.

The judgment rendered in this case upon the default granted on the 26th day of December, 1895, was rendered without the taking of proofs by the Court, and was rendered without any application on motion for judgment by the defendants in error, and without giving to the plaintiff in error any notice whatever that the defendants in error intended to apply for judgment at the time the said judgment was so rendered; the judgment rendered in this cause by the Court, and which it refused to set aside, is for the sum of seven thousand two hundred thirty-one and 25-100 dollars ($7231.25) damages and costs thirty-three and 55-100 dollars ($33.55); upon an examination of the complaint the allegation as to the amount due from plaintiff in error to defendants in error shows conclusively and affirmatively that no such judgment should have been rendered.

The complaint is fatally defective upon its face and does not support the judgment rendered in this case.

We call the attention of the Court and desire to read from page 3 of the Record, being the complaint in this cause, commencing at the word "Exhibit D," at the bottom of said page:

"The said Thorp did agree with the said Bonnifield and"
"Heid to pay said mortgage, to-wit, the sum of three thou-"
"sand six hundred eighty-six and 59-100 dollars ($3,686.59),"
"and to assume to pay all and every claim standing against"
"or on account of said premises, contracted by said Bonni-"
"field and Runkle at the date thereof."

There is no allegation in the complaint as to what the claims were, which the said Thorp assumed and agreed to pay, or as to whether or not the same were ever by him paid.

It is further alleged in said complaint, page 4 of Record, biginning on line 4, "that the defendant Thorp further agreed" "to mine, work and operate said premises and to make all" "of the payments in said lease mentioned, to-wit, the amount" "of said mortgage and debts contracted on account of said" "premises, and was to retain for himself seven-sixteenths" "(7-16) part of the net profits or net proceeds arising from the" "operation of said mine and premises, and to pay to the said" "S. A. Bonnifield and John G. Heid the remaining nine-six-" "teenths (9-16) part of the profits or net proceeds arising from" "the operation of said mine and premises, in the proportion" "of seven-sixteenths (7-16) to Bonnifield and two-sixteenths" "(2-16) to Heid."

It is also alleged in said complaint, page 4 of Record, "that under and in accordance with said agreement and as-" "signment of said lease the said Thorp entered into posses-" "sion of said premises, worked, mined and operated the same" "up to and including the 31st day of December, 1894, extract-" "ing and taking out therefrom gold to the value of thirty-two" "thousand dollars ($32,000.00) and ore and concentrates to" "the amount and value of thirty-five hundred dollars" "($3500.00); the expense of working, mining, operating and" "extracting said ore and gold from said premises was the" "sum of twenty-three thousand dollars ($23,000.00), leaving a" "balance of profits, or net proceeds, of twelve thousand five" "hundred dollars ($12,500.00), of which the said Bonnifield" "and Heid were entitled to nine-sixteenths (9-16) thereof."

Now, it does not require any great amount of mathematical knowledge to at once demonstrate the fact that S. A. Bonnifield and John G. Heid, under the complaint in this action, are not entitled to nine-sixteenths of twelve thousand five hundred dollars ($12,500.00), for the reason as shown by their own figures that, after deducting the expense of operation

from the amount of money received from the conduct, working and operation of said mine, would leave a balance of net profits of twelve thousand five hundred dollars ($12,500.00); in a former allegation of the complaint, page 3 of Record, it is alleged that out of this net profit first should be paid the mortgage aforesaid, of $3,686.59, also all and every claim outstanding on account of said premises.

Now, while the complaint is so defective that we cannot ascertain from it the amount of the outstanding claims, yet we can certainly see that out of the net proceeds the $3,686.59 must be deducted, before the defendants in error are entitled to their proportion or share; now, subtracting the $3,686.59 from $12,500.00, we have a balance of eight thousand eight hundred thirteen and 41-100 dollars ($8,813.41); now if we could by any sort of mathematical calculation ascertain from the complaint, or if the defendants in error had offered any proof, or had the plaintiff in error been permitted to show the amount of the outstanding claims, than by deducting said amount from the net proceeds, after first deducting the mortgage, then giving the defendants nine-sixteenths of said last amount, we could arrive at what the judgment should have been, under the theory of the case by the defendants in error, but we see from the Records in this case that the defendants in error have taken judgment for nine-sixteenths of twelve thousand five hundred dollars ($12,500.00), plus the two hundred dollars $200.00) claimed in their complaint, which makes seven thousand two hundred thirty-one and 25-100 dollars ($7,231.25), the amount of the judgment in this cause; this observation and calculation is conclusive so far as this judgment is concerned, and forces upon this Court the necessity of a reversal of this cause.

FIFTH.

On the 25th day of January, 1896, Honorable Arthur K. Delaney, judge of the District Court of Alaska, filed his opinion denying motion of plaintiff in error to vacate the default and directing that the plaintiff have judgment in accordance with the demands of the summons and complaint.

See Record, page 67.

And thereupon judgment was entered.

See Record, pages 68 and 69.

It will be unnecessary to call the attention of the Court to the fact that this judgment was rendered at Sitka, Alaska, a distance of nearly two hundred (200) miles from Juneau, Alaska, where all the parties to this action reside; the same was rendered without notice to the plaintiff in error or his attorneys, and was rendered in the absence of the plaintiff in error and his attorneys, and without the taking of any proofs. Taking into consideration the allegations of this most remarkable complaint, and the fact that no proof was taken and that the judgment was taken without motion on the part of the defendants in error and without notice to the plaintiff in error, it seems conclusive to our minds that the judgment was irregular and that the Court erred in granting said judgment and that it is the duty of this Court to vacate and set aside said judgment.

The complaint in this cause was defective upon its face and did not warrant the Court in directing judgment against the plaintiff in error for seven thousand two hundred thirty-one and 25-100 dollars ($7,231.25), without first taking proofs as to the allegation set forth in plaintiff's complaint; nor was the Court authorized, under any rule of practice, to permit the entry of judgment in this cause by default, without notice to plaintiff in error, after the appearance of plaintiff in error having been regularly made in this cause.

At the time of the rendition of the judgment in this cause, on to-wit, January 25, 1896, the Court had before it the stipulation signed on to-wit, December 24, 1895, and filed January 10, 1896, giving plaintiff in error until March 1, 1896, in which to serve and file his answer.

See Record, page 29.

That there is a mistake in this judgment and that the amount of the judgment is entirely erroneous and exceeds the amount which could be legally recovered, under the allegations of the complaint in this cause, to the extent of at least five thousand dollars ($5,000.00), is perfectly apparent from the complaint, and was, or ought to have been, well known to counsel and to the Court at the time of the rendition of said judgment.

It is disclosed by this record that the Court made an order directing and permitting counsel for defendants in error to file affidavits to correct the amount of the judgment, if the same be erroneous, and for that reason if for no other it is very evident that the Court was of the opinion that the said judgment was erroneous, and that he committed an error when he permitted the entry thereof.

We, therefore, insist, from a careful examination of the complaint in this cause, that no judgment whatever could have been legally taken, except upon introduction of competent proof as to the allegations of the complaint; no evidence was taken, no witnesses were sworn and no proof of any kind was offered to the Court.

SIXTH.

The defendant in error S. A. Bonnifield, who owned seven-sixteenths of the claim to the net proceeds arising from the operation and conduct of the mine set forth and mentioned in plaintiffs' complaint herein, and who had the only claim, if any claim existed, against the plaintiff in error, at

the time of the commencement of this action, or at the time of the rendition of the judgment herein, took no part in prosecuting said suit to judgment, but on the other hand discharged and released his attorney, John F. Malony, and was at the time said default judgment was taken negotiating with the plaintiff in error for a settlement of their differences; and after the judgment was obtained voluntarily came in and satisfied all of his interest or part in said judgment, and made affidavit stating that the judgment was erroneous for the reason that the same was too large.

See affidavit of S. A. Bonnifield, page 85 to 90 of the Record. Which said affidavit is in words and figures following:

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF ALASKA.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, vs. WILLIS THORP, Defendent.	COMPLAINT. No. 439.

AFFIDAVIT OF S. A. BONNIFIELD.

United States,
District of Alaska. } ss:

S. A. Bonnifield, being first duly sworn, upon oath says:

I.

That he is one of the plaintiffs in the foregoing entitled cause.

II.

That affiant's attorney, employed by him in said cause, and who exclusively represented his interests therein up to the 13th day of November, 1895, was John F. Malony, at which time affiant discharged said John F. Malony.

III.

That up to that period affiant had not employed Messrs. Johnson and Heid to represent him in said cause, and any papers signed by them as his attorneys was unauthorized by him and was presumptious on their part; that when the dedemurrer filed in this cause, by the defendant, was called on to be heard before Honorable Warren Truitt, affiant was not represented by counsel, that he had then discharged John F. Malony and had not employed counsel to represent him, and upon such statement made by affiant to the Court the hearing on said demurrer was continued for one day; that affiant in the meantime did employ Messrs. Johnson and Heid to represent his interest in said cause.

IV.

That on the 24th day of December, 1895, John G. Heid came to plaintiff's rooms and stated to affiant that Bostwick had been in their office asking for time to answer in this action on the part of the plaintiff Heid, and that he, Heid, had refused to give him any time; that said Heid then and there requested affiant not to sign any stipulation giving defendant time to answer; that said Heid said to affiant that they intended to take snap judgment against the defendant, Thorp.

V.

That subsequently, and at 2:30 o'clock of December 24, 1895, affiant called at the law office of Bostwick & Crews to see Mr. Bostwick about some matters other than the present

suit; during his stay there affiant was requested by Bostwick to sign stipulation giving defendant until March 1, 1896, in which to answer; that said Bostwick stated to affiant that Heid had refused to sign the stipulation and that unless affiant signed the stipulation he would be compelled to go to Sitka and obtain an order from the Court giving the defendant additional time to answer; whereupon affiant very gladly and willingly, and without any statement or representations from said Bostwick, signed the stipulation giving defendant until March 1, 1896, in which to serve and file their answer. That prior to signing stipulation affiant and defendant had been negotiating for settlement of this cause, and affiant had agreed to take in satisfaction of his claim the sum finally agreed upon; and affiant further states that he had discussed the matter with John G. Heid and they had both agreed that the amount claimed in their complaint was more than was actually due.

VI.

That in signing said stipulation, giving defendant additional time to answer, affiant thought he was doing right and he believed, and still believes, he had a right so to do; that affiant did not think it proper or just to take advantage of the defendant, or his attorneys, and was perfectly willing to, and always has been, that the defendant should have a right to defend said action in court.

VII.

Affiant further states that the amount of damages set forth in their complaint herein was only estimated; that affiant never had an opportunity to see the books, receipts and papers in connection with the operation and conduct of said mine, under the lease mentioned and set forth in plaintiffs' complaint herein; that subsequent thereto, and on, to-wit, December 24, 1895, Charles Sumner Johnson, of the firm of Johnson & Heid, went to Sitka and there obtained an

order of default against the defendant Thorp; that the action of said Charles Sumner Johnson in taking said default was unauthorized and unwarranted and against affiant's wishes in the premises. That the default taken on said day should be vacated and set aside and the defendant given an opportunity to file his answer.

VIII.

That subsequently thereto, and on, to-wit, January 25, 1896, Messrs. Johnson & Heid went to Sitka and there obtained a default judgment against the defendant for the sum of seven thousand two hundred sixty-four and 80-100 dollars ($7,264.80) damages, and costs, and thereupon caused an execution to be issued thereon.

IX.

Affiant further states that the obtaining of said judgment by default was unauthorized on his part; that said judgment is erroneous in as much that the amount therein set forth is too large; that subsequently to the obtaining of said judgment, on, to-wit, January 28, 1896, affiant made a thorough and careful examination of the books kept by defendant, during the operation and conduct of said mine, under the lease mentioned and set forth in plaintiffs' complaint herein; that affiant examined all of the vouchers and receipts for money paid out in the operation and conduct of said mine; that affiant examined all of the vouchers showing the output of said mine during his operation and conduct of the same, and that the amount due plaintiffs, under said contract, from the defendant, as estimated by affiant, was the sum of eight hundred dollars ($800.00) and no more. That in view of these facts affiant thereupon, and on, to-wit, January 28, 1896, had a full, final and complete settlement of all his matters and differences with the defendant growing out of the lease and contract mentioned and set forth in plaintiff's complaint herein; and thereupon received a full and complete settlement

and satisfaction for the amount due him, to-wit, seven-eighths (7-8) of the judgment obtained in this cause on the 25th day of January, 1896; that affiant thereupon executed a full and complete satisfaction of all his right, title and claim in and to said judgment, to-wit, seven-eighths (7-8) thereof.

That affiant also, on the said 28th day of January, 1896, caused to be endorsed upon the execution issued in said cause upon said judgment, a full, complete satisfaction and payment of all moneys due him on said execution on account of said judgment, and directed the United States marshal for the District of Alaska to take no further proceedings under said execution on account of the said judgment due affiant: and further instructed and directed said marshal to return said execution to the clerk of the District Court of the United States, for the District of Alaska, fully paid and satisfied so far as affiant's portion of said judgment is concerned.

X.

That thereafter, and on, to-wit, January 29, 1896, affiant called personally at the office of Messrs. Johnson & Heid and informed them that he had had a full settlement of all his matters and differences with the defendant, Willis Thorp, and that he had received satisfaction of his portion of said judgment; and that he had signed release and satisfaction of said judgment; and that he had also endorsed upon the execution, then in the hands of the United States marshal, full satisfaction of all sums due him on account of said judgment, and that they need not appear for him further in the matter.

That subsequently thereto, and on, to-wit, February 1, 1896, affiant caused a written notice to be served upon Messrs. Johnson & Heid discharging them from any further service in said cause.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 8th day of February, 1896.

(L. S.) HARRISON BOSTWICK,
Notary Public for Alaska.

Filed February 10, 1896.

Upon the presentation of the motion to vacate and set aside this judgment the error which existed in the computation of the amount of said judgment was not over-looked or neglected, but on the contrary it was fairly presented to the Court upon said hearing and the Court, at that time, in overruling the motion stated to counsel for defendants in error that there was a mistake in the computation of the amount which went to make up the judgment, and that it might be corrected in that regard; that he would give the defendants in error until the next steamer City of Topeka, on about the 25th of February, 1896, to file affidavits in said cause.

We contend that it was an error on the part of the trial court to make an order directing and allowing the defendants in error to file said affidavits, for the purpose of correcting said erroneous judgment, for the reason that the Court had already granted the writ of error and citation, and this appeal was fully perfected at the time of the making of said order.

See order on page 96 of the Record.

This order shows that more than fifteen (15) days had expired from the time the appeal was perfected, the writ of error granted and the citation issued, when the defendants in error filed with the clerk of the District Court of Alaska certain affidavits for the purpose of correcting the amount of said judgment; that said affidavits did not in any manner tend to explain or correct the error in the complaint, or in said judgment.

It is a well-settled and established principle of law that complaints cannot be supported or sustained by affidavits, as to their meaning, after judgment by default, or at any other time or at all; as appears from this record these affidavits were never brought on for a hearing, counsel never presented them, never asked that the judgment be corrected, never made argument thereon or had the ruling of the Court thereon.

See Record, pages 113 to 126.

The plaintiff in error thereupon immediately moved to strike the affidavits from the files, and that they be not made a part of the record in this cause; which motion to strike, and order refusing to strike said affidavits, are found on page 130 of the record; the plaintiff in error excepted to said order and ruling of the Court and his exception was by the Court allowed.

The order of the Court permitting and directing counsel to file affidavits to correct said erroneous judgment was an error, for the reason they were prevented from so doing because the writ of error in this cause had been granted and the appeal perfected before said order was granted allowing the defendants in error to file affidavits to correct said judgment. and as a result the Court had lost jurisdiction of this cause.

It was frankly confessed by the trial Court, in the discussion of the pleadings in this cause, upon motion of plaintiff to vacate and set aside the judgment, that the judgment was erroneous, and that the calculation of the amount incorrect; counsel for defendants in error were given an opportunity to correct the error but failed to do so; we insist it is such an error, that the complaint is so thoroughly defective, that the amount of the judgment is so absurd and entirely incorrect and erroneous and not in accordance with the allegations of the complaint, that the same could not have been corrected by affidavits or otherwise; the suggestion of the Court is so absurd that it must have been made to counsel, by the Court, with the view that they would confess their error and make an effort to correct the same, or consent to the setting aside of the default judgment; and was evidently made by the Court with the fact in view that counsel for defendants in error could not and would not refuse to correct said erroneous judgment, or else consent that said default judgment be vacated and set aside; for the Court must have known that, in case said erroneous judgment was not in some manner corrected or vacated and set aside that this appeal would be prosecuted, and that this Court would certainly reverse

the action of the lower Court in the face of such glaring errors.

It is the duty of the trial Court after judgment has been rendered by default, against the defendant, for want of an answer, when it fully appears from the affidavits that the defendant had a meritorious defense to the action on its merits, and that his failure to answer in time was simply due to neglect, carelessness or want of diligence on part of counsel or himself, where it does not appear to be willful neglect or intention to delay the trial of the cause, or injure the plaintiff, to vacate and set aside the judgment; and it is an abuse of the discretion on the part of the Court to refuse to set aside the default and permit the defendant to answer to the merits.

Brown vs. Philadelphia, Wilmington & Baltimore Railway Co., 9 Federal Reporter, 133.
27 Pacific Reporter, 376.
51 Northwestern Reporter, 1101.
52 Northwestern Reporter, 379.
50 Northwestern Reporter, 530.

It is a well-settled principle of law that a default judgment, be it ever so regular, should be dismissed by vacating and setting aside if it shall appear to the Court that the defendant has a meritorious, just and legal grounds of defense.

Brown vs. Philadelphia, Wilmington & Baltimore Railway Co., 9 Federal Reporter, 183.

While it is true that the opening up of defaults, or setting aside of judgments by the trial Court is largely in the discretion of the Court, the discretion spoken of, and what is meant, is only legal discretion; such action in the premises as will promote the ends of justice and protect the rights and interests of the parties.

13 Wisconsin, 485. Francis v. Cox, 33 Cal. 323
55 Wisconsin, 390. Reidy v. Scott 53 Cal. 69.
70 Wisconsin, 212. Watson v. S.F.&H.B.R.R.Co. 41 Cal.
61 Wisconsin, 514. Cameron v. Carroll, 67 Cal
18 California, 457. Dougherty v. Nevada Bank, 68 C
68 California, 275. 65 Cal. 22
* Burns v. Scoofy, 98 Cal. 271.

It appears from the affidavit of H. Bostwick, see record, pages 30 to 36, and from the answer of plaintiff in error, pages 73 to 78 of the record, that plaintiff in error had a good, substantial and meritorious defense upon the merits to this cause.

Messrs. Johnson & Heid, who claim to represent defendants in error, had no authority to appear in this cause and take judgment on behalf of the defendant in error S. A. Bonnfiield; attention is called to the affidavit of H. Bostwick, pages 30 to 36 of the record; also to affidavit of S. A. Bonnifield, pages 85 to 90 of the record; also to affidavit of W. E. Crews, pages 92 to 94 of the record.

On November 9, 1895, the defendant in error S. A. Bonnifield discharged his counsel, John F. Malony, from this cause.

See notice of discharge, page 26 of the record.

The judgment in this cause should have been vacated and set aside upon motion of plaintiff in error if for no other reason upon the ground that the defendant in error S. A. Bonnifield gave to plaintiff in error until March 1, 1896, in which to file his answer, and at said time S. A. Bonnifield had no counsel to represent him in this cause and therefore had a perfect right to act for himself and enter into a stipulation giving plaintiff in error additional time to answer.

See stipulation, page 29 of the record, also affidavit of S. A. Bonnifield, pages 85 to 90 of the record.

Every Court has an inherent right to vacate entries in its records for judgments, orders or decrees.

Ladd vs. Mason, 10 Oregon, 308.

The Supreme Court has power under section 102 of the Civil Code of Oregon, to entertain an application to relieve a party from the decree and judgment against it, through its mistake, indifference or excusable neglect or otherwise.

Branson vs. The Oregon Railway Co., 10 Oregon, 278.

The power to relieve from judgment under this section is discretionary, but the action of the Court will be reversed on abuse of discretion.

Bailey vs. Taaffe, 29 California, 422.
Johnson vs. Eldred, 13 Wisconsin, 482.
Powell vs. Weith, 68 North Carolina, 342.

The power is to be liberally exercised.

Mason vs. McNamara, 57 Illinois, 274.

Neglect of an attorney is neglect of the party and excusable upon the ground for relief.

Austin vs. Nelson, 11 Missouri, 192.
Spaulding vs. Thompson, 12 Indiana, 477.

It is the practice almost universally to set aside default judgments upon a showing by the defendant that he has a good, substantial and meritorious defense to the action upon its merits; had the trial Court in this cause imposed upon the plaintiff in error a penalty, for what might seem to be a neglect on his part, no exceptions could, or would have been taken; but the Court metes out to the plaintiff in error the severest penalty within its power, by rendering a default judgment for the sum of seven thousand two hundred thirty-one and 25-100 dollars ($7,231.25) damages, and then upon a showing by plaintiff in error of merits refuses to permit him to file answer and defend the cause.

In the argument upon the motion to vacate and set aside

the judgment in this cause, the trial Court announced from the bench that his decision upon the motion to vacate and set aside the default was res judicata and therefore without going into a discussion of the merits promptly denied motion of plaintiff in error to vacate this judgment.

The attitude of the trial Court in granting this default and judgment, and in refusing to vacate the default and judgment in this case, is a most remarkable one; if the Court was attempting, or intending, to do equal justice between all the parties to this action, he certainly made a most dismal failure, and in his attempt to construe the law he made a powerful argument on behalf of the defendants in error; the order shows that the Court refused to consider the affidavits offered in support of the motion to set aside default judgment.

See order, page 96 of the record.

Which order is in words and figures following:

S. A. BONNIFIELD and JOHN G. HEID,
vs.
WILLIS THORP, } No. 439.

ORDER DENYING MOTION TO VACATE JUDGMENT.

In this cause, defendant's motion for an order setting aside the judgment granted herein on January 25, 1896, coming on regularly to be heard, plaintiff and defendant each being represented by counsel, and after hearing argument of counsel, and the Court being fully advised in the premises, denies said motion, but if there is a mistake in the computation as to the amount of judgment it may be corrected in that regard; and plaintiffs are given until the arrival of the next steamer, "City of Topeka," on or about February 25, 1896, to file affidavit to show no error exists in said judgment, to which ruling of the Court the defendant at the time excepts.

While it stands admitted by counsel, and must be ad-

mitted here, for it is shown conclusively by the record, that an error exists in the amount of said judgment, and that the cause ought to be reversed, yet counsel may insist before this Court that the judgment is correct, and it is for that reason that we make these observations and cite the record in support of these conclusions.

It will be observed from an examination of the record that every effort was made, that every legal step was taken, that could be taken, by the plaintiff in error, and his counsel, to avoid the consequences of this erroneous judgment.

The record discloses the fact that the various motions were taken immediately, and that the same were brought on for hearing at the first opportunity, before the District Court of Alaska.

That judgment was obtained by default on the 26th day of December, 1895; that the next regular term of the District Court of Alaska would be in session on the 31st day of March, 1896, and for that reason at least none of the rights of the parties could be lost by reason of the setting aside of this judgment and permitting the defendant to file his answer. It will be observed from an examination of the record in this cause that the opinion of the Court in refusing to grant the relief rendered his opinion upon the application to vacate and set aside the default, which was submitted without argument; it will be observed that immediately thereafter, and upon the rendition of the judgment, the application was made, and affidavits filed in support thereof by the plaintiff in error, to set aside this judgment, and that the same were presented and argued by counsel; that the Court refused to consider the force and effect of the affidavits filed in support of the application to set aside this judgment, but held that its ruling on the application to set aside the default was res judicata. Counsel for plaintiff in error had every reason to believe, and did believe, that this cause would be settled, as shown by the affidavit of S. A. Bonnifield; see record, pages 85 to 90; set-

tlement between the parties was in contemplation, the facts were known to the counsel for defendants in error, as well as to all other parties concerned or interested in this cause, and for that reason, as is shown by the affidavit of S. A. Bonnifield, which was filed in support of this application, that he was acting exclusively and solely for himself; that Messrs. Johnson & Heid had no right or authority to represent him in this cause; counsel, therefore, had no reason to believe that steps would be taken looking to the taking of default or judgment in this cause; after the judgment was obtained, however, the record discloses the fact, from the affidavit and proceedings, that every step was promptly and properly taken to set aside this judgment, and that a showing as strong as possible to be made, under any state of circumstances or any state of facts, was made and presented to the Court in support of this application; as a conclusive proof of this fact we call the Court's attention to the affidavits of H. Bostwick, pages 30 to 36 of the record; also the affidavits of S. A. Bonnifield, pages 80 to 85 of the record, and the affidavit of W. E. Crews, pages 92 to 94 of the record.

Viewing the record in this case, as it stands, and after an examination of the law, it must certainly be evident to this Court that the trial Court committed an error in refusing to set aside said default and judgment, and that it is the duty of this Court to reverse the judgment of the trial Court.

The learned judge who presided in the trial Court was manifestly not familiar with the maxim, "Justitia nemini neganda est."

The judgment of the lower Court should be reversed and the cause remanded with instructions to have case dismissed.

Respectfully submitted,

BOSTWICK & CREWS,

Attorneys for Plaintiff in Error.

HARRISON BOSTWICK,

Advocate.